THE HIGH COURT OF SWAZILAND

Civil Case No.1792/03

In the matter between:

A & B **EWESTMENTS (PTY) LIMITED** **Petitioner**

And

V & M INVESTMENTS (PTY) LIMITED **Respondent**

CORAM : **MASUKUJ.**

For the Petitioner **: Advocate P.E. Flynn (Instructed by Cloete Corporate Consultants in association with E.J. Henwood)**

For the Respondent **: Mr L.R. Mamba**

JUDGEMENT
4th March 2004

Relief Sought

The Petitioner seeks an Order to bring the Respondent's life to an end. It has petitioned for the winding up of the Respondent in the hands of the Master of the High Court, in terms of the provisions of the Companies Act, No.7 of 1912 (hereinafter referred to as "the Act"). It is alleged by the Petitioner that the Respondent is unable to pay its debts in the sense envisaged in Section 112 (f) of the Act.

Background

The Petitioner is a registered company, incorporated with limited liability according to the laws of Swaziland and having its principal place of business in Mbabane. The Respondent is also duly incorporated and registered with limited liability according to this country's

company laws. The Respondent carries on business at Lot 53 Gwamile Street, Mbabane, Hhohho District." - ' " ----------

There appears to be a long and convoluted history between the parties herein and their representatives, who deposed to the various sets of affidavits, namely Mr Simon Torgeman, for and on behalf of the Petitioner and Mr Charalambos Simillides, for and on behalf of the Respondent. I do not find it necessary nor desirable to enmesh myself in the accusations, counter-accusations, allegations and denials made in the papers filed or record, save where these are relevant for the express and sole purpose of determining the chief question that confronts this Court, namely whether this is a proper case to grant the relief sought by the Petitioner and whether the grounds set out by the Petitioner satisfy the requirements of Section 112(f) of the Act.

Common Cause factors

The following facts appear to me generally to be common cause: -

1. That the parties' representatives, Torgeman and Simillides (who shall henceforth be referred to as such), have a long business association.

2. That the Petitioner, through the instrumentality of Torgeman lent and advanced the Respondent a sum of El,200.000.00 interest free in order to assist the Respondent's business which was experiencing serious cash flow problems;

3. The loan was to be repaid in monthly instalments of S3 750.00 (three thousand Seven hundred and fifty U.S. Dollars).

4. An agreement was recorded by the above parties and which had consequences in Shareholding of the two parties. I record that there are certain disputes in that regard and further record that the Respondent challenges the validity of the agreement. It is however common cause that :-

(a) the Petitioner purchased the equipment and fixtures of the Respondent for E65O,O0O.0O

5. the said equipment and fixtures were let to the" Respondent byThe" Petitioner for a sum of E7,500.00 per week.

6. that the Petitioner was to pay for the rates and taxes in respect of lot 53, Gwamile Street, which had been erroneously agreed belonged to the Petitioner, and was also to pay insurance premiums in respect of the said premises.

Petitioner's Case

The Petitioner claims that the Respondent stands in breach of the said agreement in that it has failed to pay some of the amounts therein stipulated. It is further averred on behalf of the Petitioner that the Respondent is indebted to the Petitioner in the sum of E61,092.81 and to thirty-two other creditors, including Torgeman, in various amounts. It is also alleged that MTN Swaziland issued a summons in this Court against the Respondent and that Swaziland Meat Wholesalers, one of the Respondent's creditors, was at the verge instituting legal proceedings. It was in view of the above that the Petitioner submitted that the Respondent is unable to pay its debts.

Respondent's Case

In Response to the Petitioner's averments above, the Respondent denies that it has committed an act of insolvency and proceeded to deny that it was not paying the amount in respect of the weekly rentals for the fixtures and fittings. It also states that the amount of E21,000.00 allegedly owed to Torgeman had nothing to do with the Respondent but had everything to do with Simillides in his personal capacity. The Respondent further stated that the long list of creditors provided by the Respondent consists of ordinary trade creditors in the course of business. In relation to an amount of E30,000.00 allegedly owed by the Respondent or Simillides and also listed amongst the debts, Simillides avers that that amount was in respect of a private arrangement between Torgeman, one Pretorious and himself and therefor had nothing to do with the Respondent. The Respondent, in relation to the Summons issued against it by MTN, states that some terms of payment have been agreed to *inter partes.*

Is the Petitioner entitled to the remedy it seeks? - The **law** applicable.

As indicated above, the petition is brought under provisions of Section 112 (f) of the Act and which provides as follows:-

"A company may be wound up by the Court if-

(a).....
(b).....
(c).....
(d).....
(e).....
(f) it is unable to pay its debts."

Section 113 which is in my view not directly relevant *in casu* but may be considered for purposes of comparison, provides for situations in which a company may be deemed unable to pay its debts. The said provision reads as follows:-

"A company shall be deemed unable to pay its debts

?

7. *if a creditor, by cession or otherwise, to whom the company is indebted in a sum exceeding one hundred emalangeni then due, has served on the company by leaving it at its registered office, a demand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or to compound for it to the reasonable satisfaction of the creditor ; or*

8. *if execution or other process issued on judgement, decree, or order of any court of law in favour to a creditor of the company is returned by the sheriff or messenger with the endorsement that he has not found sufficient assets to satisfy the judgment, decree, or order, or that any assets found did not, upon sale, satisfy the execution or other process; or*

9. *if it is provided to the satisfaction of the Court that the company is unable to pay*

its debts, and in determining whether a company is unable to pay its debts, the_ Court shall take into account the contingent and prospective liabilities oftHe ~~ company. "

I am of the view that for the Court to determine whether or not a company is unable to pay its debts for the purposes of the provisions of Section 112 (f) under which this petition has been brought, it is not necessary to have recourse to the provisions of Section 113. Section 112 (f) must in my view be read as a self-contained provision, complete in and of itself.

It is clear in my mind that for an Order to be granted under Section 112 (f), it is incumbent upon the Petitioner to show that the company is as a matter of fact unable to pay its debts and for this purpose, contingent and prospective debts are not taken into consideration. The latter debts in my view, come in to focus where the Court is asked to deem the company unable to pay its debts under Section 113. For Section 112 (f), there must be placed before the Court facts that show directly that the company is unable to pay its debts, whereas in the latter, the surrounding circumstances, as set out in Section 113 must tend to show or suggest or lead to the conclusion that the company is unable to pay its debts. See COMMONWEALTH SHIPPERS LTD VS MARYLAND PROPERTIES (PTY) LTD 1978 (1) SA 70 (D & C.L.D.) and KOEKEMOER VS TAYLOR AND STEYN N N O AND ANOTHER 1981 (1) SA 267 (WLD) per Goldstone J. Joubert, "LAWSA" Vol. 4, Butterworths 1981 at page 362, par. 386.

The phrase that the company is unable to pay its debts has been described as. follows by Joubert "LAWSA" *(supra)* at page 326:-

"A company is unable to pay its debts when it is commercially insolvent. A company is commercially insolvent if it is unable to meet current demands upon it its day - t o day liabilities in the ordinary course of business. "

According to Henochsberg on the companies Act, 3rd Edition, Butterworths, 1985, at page 602, evidence that a company has failed on demand to pay a debt payment which is due is cogent *prima facie* proof of inability to pay its debts.

In deciding whether it has been indubitably proved that the Respondent is unable to pay its debts, it is however necessary not to act in oblivion of the "weFT recognised caufionary principle that:-

> *"winding up proceedings ought not to be resorted to in order by means thereof to enforce payment of a debt, the existence of which is bona fide disputed by the company: the procedure for winding up is not designed for the resolution of disputes as to the existence or non-existence of a debt.... The Court has a discretion as to whether or not a winding up order is to be made, and, in a case where a creditor's claim is disputed, the Court will generally exercise its discretion against making an order at the instance of a person claiming to be a creditor if it is satisfied that the claim is bona fide disputed on reasonable and substantial grounds." -BADENHORST VS NORTHERN CONSTRUCTION ENTERPRISES (PTY) LTD 1956 (2) SA 346 at 348.*

Applying the law to the facts

To therefor crystallise the question, the Court has to determine two issues. First, whether the Petitioner has proved to the satisfaction of the Court that the Respondent is unable to meet its day-to-day liabilities. Secondly, since it is clear that the Respondent disputes the alleged inability to pay, whether its opposition is *bona fide* and premised on reasonable and substantial grounds.

Regarding the various debts allegedly owing by the Respondent to the Petitioner and other creditors, I am of the view that the Petitioner has failed to allege or show that a demand to pay the debt was made and that the Respondent was unable to meet the same in the ordinary course of business. It would appear to me from the excerpts from both Joubert *(supra)* and Hechsberg above that that indeed is the position. By demand as used by Joubert, it is my view that that demand is ordinary and is not the same as that required under Section 113. Another requirement to be shown is that the payment of that debt must be shown by the Petitioner to be due. I find again that the Petitioner has failed on this score, particularly here where the Respondent alleges that most of the debts are trade creditors in the course of business, which in my view fall under contingent and prospective and are not to be considered in the light of authorities cited above.

Some of the debts are explained, in my view in a satisfactory manneT by the Respondent "e.g. the debt to MTN Swaziland, together with the monies allegedly owing to the Petitioner and Torgeman. There are no specific allegations from the Petitioner in reply thereto. The Respondent has however in my view not adequately or at all addressed the debts alleged in paragraph 11.1 and 11.2 of the Petition. This is an indication that these were due in terms of the agreement Mr Mamba alleged that the agreement is null and void in certain respects, including that it is oppressive. The Respondent should not be allowed to plead this when it benefited from certain clauses of the same agreement it now wishes the Court to declare invalid. If the allegations is that the agreement is invalid, then an appropriate application for a declarator must in my view be moved.

Subject to what I say below, the position would in my view be that the Applicant has shown that the Respondent was unable to pay debts set out in paragraphs 10, 11.1 and 11.2. There are no real and substantial answers given by the Respondent regarding these.

It is indicated that the Court in such matters is called upon to exercise a discretion. 1 am of the view that the peculiar circumstances of the matter serving before Court should influence the Court in deciding whether or not it is judicious to exercise its discretion one way or the other.

Factors that I find to be of relevance in the exercise of the discretion in this case are the following: The Application was brought on an urgent basis on the 18th July 2003, on barely two hours notice to the Respondent and the matter was postponed for about two days to the 20th July 2003. That can hardly be said to have been fair or sufficient time to the Respondent, given the factual and legal issues that characterise this matter.

It is also worth pointing out that Torgeman was aware that Simillides was away from the country at the time he moved the application. At paragraph 9.2 to 9.3 of the Petition, Torgemen stated the following:-

> "9.2 *In addition thereto, your Petitioner's Managing Director, Torgeman sought to discuss the matter with Simillides during the course of the week commencing 7 July 2003 only to discover that he had travelled to Greece on Holiday. At present,*

^ *Simillides is still on holiday and your Petitioner is uncertain whether he wij[inject Return to Swaziland.* '

9.3 Torgeman was able to "track Simillides down " telephonically wherein Simillides acknowledged that the Respondent was facing severe financial difficulties but that he would "sort it out on his return in about "six weeks time ". Your Petitioner submits that this is in itself reckless disregard of the obligations which he and the Respondent owe to the creditors. "

In response thereto, Simillides stated that Torgeman was aware that he would be away and that Torgeman in fact financed this trip, an allegation that Torgeman did not deny. All that he could say in reply was that he thought Simillides was away for only two and not six (6) weeks. It is clear that Torgeman's intention was to create an erroneous impression to the Court that Simillides was most unlikely to return to Swaziland in view of the Respondent's financial position and that he Torgeman was unaware that Simillides would be away. These two issues to me constitute a serious black *nota* against the *bona fides* of the Petitioner and would suggest lacks of candour on Torgeman's part, which was calculated to cast aspersions on Simillides. This behaviour, as submitted by Mr Mamba must be considered in the same light as allegations made by an applicant in an *ex parte* application and where *bona fides* and a full and frank disclosure of all attendants facts must be disclosed. If that is not done, the Court may discharge any *rule nisi* granted on the basis of concealed information and of which the Court was unaware at the granting of the application.. - See MAKHOWE INVESTMENTS VS USUTHU PULP CO. LTD (unreported per Hull. C.J.) and COMETAL-MOMETAL VS CORLAN ENTERPRISES 1981 (2) SA 412 (WLD) at 414.

It is also well to recognise that after the launch of the petition on the 18th July 2003, the matter remained unheard for a period of about six (6) months. It would appear from the papers that the provisional liquidator was removed (see par.3 of application dated 28th November 2003, deposed to by Torgeman on the present Petitioner's behalf). It is also an ineluctable fact of which I take judicial notice that the Respondent's business has been and continues to operate. It would in my view be a highly precipitous step for the Court to exercise its discretion in these circumstances in the Petitioner's favour in view of the length of time. The Court is being asked to bring the Respondent's life to an end of the strength

allegations that are more than six (6) months old. A lot may have changed in the mterim, either for the better or for the worst. The Court remains in The dark "resardirm the Respondent's present state of affairs. To exacerbate matters, the provisional liquidator does not from the record appear to have filed an interim reports of his findings which could confirm or allay the Petitioner's fears.

I therefor decline for the above stated reasons to grant the final liquidation order. The rule be and is hereby discharge with costs. To mark disapproval of Torgeman's conduct and attempt to conceal certain facts and thereby mislead this Court as indicated above, I order that costs be and are hereby granted against Torgeman *debonis propiis.*

It is a matter of observation that the agreement relied upon by the Petitioner and a copy of which is annexed to the Petition, has a fully fledged mechanism for dealing with breach and for settling disputes. In particular, I refer to the provisions of clause 11 and 13 thereof. In this regard it is worth noting that annexure "ST3" to Petition was in fact drafted in terms of the agreement. It would have been prudent, in my view for the Petitioner to have had recourse thereto first and exhausted the remedies that the parties bound themselves to at the signature of the agreement.

There is an issue which I need to mention that has caused difficulty and consternation for me. First, there appears to have been hearings and some Orders that were granted in this case with no entries on the file cover nor duly prepared Court Orders. I have in mind the removal of the provisional liquidator which, as indicated above, only comes to light in an application by the Petitioner to file its Replying Affidavit. There is no entry on the file indicating this. The other issue is a consent Order apparently granted by this Court. Its terms have not been recorded and it remains a question of surmise what its nature and content is and more importantly it is unclear what effect it has on the present proceedings. This is most a unsatisfactory state of affairs, considering that different Judges are from time to time assigned to handle matters in this Court. Full and accurate notes of events and Orders issued are therefor absolutely critical to inform the Judges and other parties of all the events and their sequence relating to this matter as more often than not, the entries do have an effect on the course and direction the matter has to assume. This must be rectified.

I also have to consider the propriety or otherwise of granting an application by the Respondent for the summary award to it of damages allegedly suffered by it as-a-resurt-of-the petition for winding up the Respondent. Mr Mamba argued that as a result of the proceedings receiving generous media coverage, the Respondent suffered damages in that the number of customers declined and its suppliers thereafter refused to extend to it credit facilities. Mr Mamba, in view of the foregoing, urged this Court to exercise the powers vested in it by the provisions of Section 15 of the Insolvency Act, 1955.

The said Section reads as follows:-

> *" Whenever the court is satisfied that a petition for the sequestration of a debtor's estate is malicious or vexatious, the court may allow the debtor forthwith to prove any damage which he may have sustained by reason of the provisional sequestration of his estate and award him such compensation as it may deem fit:*
>
> > *Provided that nothing contained in this section shall debar the debtor from claiming any other relief open to him at law."*

The question to be determined in my view is whether this Section, which is contained in the Insolvency Act, is applicable to proceedings initiated in terms of the Companies Act. From the rendering of Section 15 above, it is clear that this Section applies to the estate of a "debtor", in cases where the sequestration proceedings against him are malicious or vexatious.

Section 2 of the Insolvency Act describes a debtor in the following manner:

> *"In connection with the sequestration of debtor's estate means a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, <u>except a body corporate or a company or other association of persons which may be placed in liquidation under law relating to companies</u>. "* (Emphasis my own)

It is clear from the above definition that this Act and by extension, the Section in question applies to sequestration of the estates of individual persons and/or partnerships-bat is-of-no application ro body corporates or companies or to other association of persons which may be placed in liquidation under the law relating to companies. The Respondent appears to me to be such a person because it is a body corporate and the proceedings for its liquidation were brought in terms of the provisions of the Companies Act. It would be improper and unfair therefor in my view to transpose the provisions strictly applicable to sequestration under the Insolvency Act, to a liquidation carried out in terms of the Companies Act.

In view of my conclusions in that regard, I decline to make any such Order in terms of Section 15 simply because it is inapplicable *in casu.* If the Respondent feels aggrieved and is of the view that the Petitioner's petition was actuated by malice and was vexatious, it must launch appropriate proceedings under the Companies Act (if provided for) or in terms of the law of delict.

T.S. MASUKU
JUDGE^